No. 83-744

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

LEO FUENTES
Petitioner

-vs-

THE PEOPLE OF THE STATE OF MICHIGAN
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

FRANK J. KELLEY
Attorney General of Michigan

Louis J. Caruso
Solicitor General of Michigan
Attorney for Respondent

Business Address:
760 Law Building
525 W. Ottawa
Lansing, MI 48913
Telephone: (517) 373-1124

Edwin M. Bladen
Assistant in Charge
Economic Crime Division

J. Ronald Kaplansky
Donald E. Erickson
Assistant Attorneys General

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COUNTERSTATEMENT OF QUESTIONS

I. Where Petitioner was charged with a "knowing" presentation of false medicaid claims and the Michigan trial court gave an instruction on the element of "knowledge" which included reading to the jury the statutory definition of the word "knowing" but declined to give an instruction on specific intent to deceive, were the instructions constitutionally adequate to inform the jury of the mental state required for conviction under Michigan law?

II. Was sufficient evidence adduced for a rational trier of fact to find that the essential elements of the crime charged were proven beyond a reasonable doubt?

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JURISDICTION OF THE COURT

Page 1 of the Petition states that jurisdiction is conferred upon the Court in this case by 28 USC § 1254. That statement is erroneous. If jurisdiction exists in this case, it must be conferred by 28 USC § 1257(3).

STATUTORY PROVISIONS INVOLVED

Michigan Medicaid False Claim Act, § 2(c), MCL 400.602(c); MSA 16.614(2)(c):

> " 'Knowing' and 'knowingly' means that a person is aware of the nature of his conduct and that his conduct is substantially certain to cause the intended result."

Michigan Medicaid False Claim Act, § 7, MCL 400.607; MSA § 16.614(7):

"(1) A person shall not make or present or cause to be made or presented to an employee or officer of the state a claim under Act No. 280 of the Public Acts of 1939, as amended, upon or against the state, knowing the claim to be false, fictitious, or fraudulent.

"(2) A person who violates this section is guilty of a felony, punishable by imprisonment for not more than 4 years, or by a fine of not more than $50,000.00, or both."

COUNTERSTATEMENT OF THE CASE

On October 17, 1979, a 35-count, criminal complaint naming as co-defendants American Medical Centers of Michigan Ltd., a Michigan corporation (hereinafter called "American"), Eugene Kraus, Felma Fuentes, M.D., Leo Fuentes, M.D., and Anton Zadurowycz, M.D., was filed in District Court 54A. The following day the Petitioner, Leo Fuentes, M.D., was arrested and arraigned.

The Petitioner was charged only in Counts XVIII through XXV inclusive of the complaint and was examined thereon in District Court 54A. On March 26, 1980, a return was filed in Ingham County Circuit Court binding the Petitioner over for trial as charged. An Information was filed April 11, 1980, and on May 26, 1980, the Petitioner filed a written waiver of arraignment and stood mute.

The trial commenced on October 27, 1980, (Tr 2) the jury was sworn on October 30, 1980, (Tr 502-503) and the trial ended on November 13, 1980, with verdicts, regarding the Petitioner of guilty on Counts XVIII, XX, XXIII, and XXV and not guilty on Counts XIX, XXI, and XXII, and XXIV (Tr 1625).

The basic nature of the remaining charges against the Petitioner are that, knowing them to be false, fictitious or

fraudulent, he caused four claims for payment of money under the Social Welfare Act to be made or presented. It is charged that the claims represented that a "direct, diagnostic laryngoscopy" had been performed for certain patients when in truth that service had not been performed for those patients. The basic nature of the evidence was as follows.

To participate in the Medicaid Program, a doctor makes a request to enroll (Tr 679) by submitting a form, like Exhibit 10, which is the Provider Enrollment Agreement submitted by the Petitioner (Tr 549-550, 1208 and 1588-1589). The practice of the Department of Social Services is to send each doctor a policy manual (Exhibit No. 1) and a procedure code manual (Exhibit No. 2) at the time of enrollment (Tr 679). A doctor takes care of a Medicaid recipient, then Medicaid is billed for the services performed on claims forms furnished by Medicaid (Exhibit Nos. 16-36). When a claims form is received, it is processed by a computer (Tr 680), so code numbers are used to describe who the patient is, what the doctor's diagnosis is and what treatment procedure was performed (Tr 681-683).

The policy manual (Exhibit No. 1) describes the basic standards of the program and how to bill (Tr 677-678 and 706-707) and there is additional information in the coding manual (Exhibit No. 2) about how to use procedure codes in describing the medical services performed for a patient (Tr 678 and 707). The procedure code manual was available and used at the offices where the Petitioner worked (Tr 1202).

It was stipulated that the Petitioner enrolled in the Medicaid Program (Tr 1588-1589), and the testimony indicates that the clinic's practice for billing Medicaid was as follows. When a Medicaid patient came in, a copy of his or her Medicaid card was made and the patient was asked to sign a billing sheet (Tr 1200). In addition, there were medical records

kept on each patient, which were completed by either a physician's assistant or a doctor, whoever saw the patient (Tr 1200). Whenever a physician's assistant saw a patient, the supervising doctor would review the chart and initial it (Tr 1200).

When a patient was seen, the billing sheet and patient chart were taken into the examining room and completed (Tr 1061 and 1268). The same information about treatment was written on both forms (Tr 1067-1068). Afterwards they were separated. The billing form was processed and the patient chart was reviewed, initialled and filed until the next visit by the patient (Tr 1068 and 1269).

Medicaid claims forms were prepared from the internal billing sheets (Tr 1269-1271); however, the medical charts were also used to complete those claims forms (Tr 1201).

As a review of Exhibit Nos. 16-36 shows, each claims form has space for billing up to four different procedures (Tr 682). This appeal involves four claims forms. The Petitioner was found guilty on Count Nos. XVIII, XX, XXIII, and XXV (Tr 1625). The claims forms pertinent to those counts are in Exhibit No. 36 for Count XVIII, in Exhibit No. 34 for Count XX, and in Exhibit No. 32 for Counts XXIII and XXV.

The claims forms in question are not in question for all the procedures billed on them. What was in question are billings for what the claims forms describe as "laryngoscopy" followed by the procedure code number "2140". That procedure code number comes from page 98 of Exhibit No. 2, which was enlarged for demonstrative purposes as Exhibit No. 3 (Tr 678). The definition for Code No. 2140 in those exhibits is:

"Laryngoscopy, direct, diagnostic"

and that code is found in the section of Exhibit No. 2 which deals with the surgical procedures (Tr 686).

Literally, the word "laryngoscopy" means that a person's larynx (voicebox) was examined, but in the practice of medicine the usual practice is to describe the process by which such an examination is done (Tr 573). This is done by using the description "direct" or "indirect," (Tr 573) and without such a description the word laryngoscopy has no medical meaning (Tr 693).

A direct laryngoscopy is a surgical procedure (Tr 581) usually taught in medical school during a surgery rotation at a hospital (Tr 583-584 and 676). An indirect laryngoscopy is an office procedure which is a part of an office visit and is not separately billed (Tr 580 and 628).

The Petitioner's Medicaid Provider Agreement (Exhibit No. 10) indicates he is an M.D. licensed to practice in Michigan, and that is supported by the testimony about his role as supervising physician (Tr 962, 1049 and 1198-1199).

The laryngoscopies allegedly performed in connection with the billings in question were done by use of Exhibit No. 5A (Tr 969-970, 1009, 1052 and 1060). However, use of such an instrument is an indirect laryngoscopy (Tr 574-575 and 1052-1053). The Petitioner showed the instrument (Exhibit No. 5A) to the physician's assistants and gave instructions in its use (Tr 969 and 1052).

With regard to Count XVIII, although the physician's assistant testified that a laryngoscopy was performed using Exhibit 5A (Tr 992-993), the patient Sheila Jones testified that she was never examined with Exhibit No. 5A (Tr 1079-1080).

With regard to Count XX, the physician's assistant said she performed a laryngoscopy with Exhibit No. 5A (Tr 998),

and the patient Shirley Williams recalled being examined some times with Exhibit No. 5A (Tr 882).

With regard to Count XXII, the physician's assistant testified she performed a laryngoscopy using Exhibit No. 5A (Tr 1001-1002). The patient Edna Coleman testified she was not examined by the use of Exhibit No. 5A everytime, but her throat had been examined that way (Tr 897-898). Similar testimony was given by the physician's assistant in regard to Count XXV (Tr 1003) and that count also involves Mrs. Coleman.

SUMMARY OF ARGUMENT

The first question presented by the Petitioner does not truly raise a federal question. As Petitioner's argument shows, the real issue is whether the Michigan courts correctly interpreted the Michigan statute. Furthermore, for the reasons set forth hereinafter, there is a sound basis for the construction adopted in the jury instructions.

The second question presented by the Petitioner merits no further review by the court. The trial court carefully adopted the proper standard for reviewing the sufficiency of the evidence, and viewed in the light favorable to the prosecution, a rational trier of fact could have found that the claims in question were false, fictitious or fraudulent.

ARGUMENT

I.

WHERE THE JURY WAS FULLY AND PROPERLY INSTRUCTED ON THE MENTAL ELEMENTS OF THE OFFENSE UNDER MICHIGAN LAW, PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED WHEN THE TRIAL COURT DECLINED TO GIVE AN INSTRUCTION ON SPECIFIC INTENT TO DECEIVE.

"Criminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] and an evil-doing hand . . .'" *United States* v *Bailey*, 444 US 394, 402 (1980) (citation omitted). However, vicarious criminal liability can be imposed even though a defendant did no personal act. *People* v *DeClerk*, 400 Mich 10, 20-23; 252 NW2d 782 (1977). Likewise, the legislature can eliminate any *mens rea* requirement and impose "strict liability." *People* v *Roby*, 52 Mich 577, 579; 18 NW 365 (1884); *People* v *Sybisloo*, 216 Mich 1, 5; 184 NW 410 (1921); *People* v *Thompson*, 259 Mich 109, 119-121; 242 NW 857 (1932). Furthermore, it appears that "a statute can create both strict liability and vicarious liability." *People* v *DeClerk, supra*, at 22, n. 7.

The question raised by the Petitioner concerns what type of *mens rea* must be proved under the statute involved in this case. This Court has said:

> "Few areas of criminal law pose more difficulty than the proper definition of the mens rea required for any particular crime.
>
> "• • •
>
> "At common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.' This

venerable distinction, however, has been the source of a good deal of confusion.

"• • •

"This ambiguity has led to a movement away from the traditional dichotomy of intent and toward an alternative analysis of mens rea.

"• • •

"As we pointed out in *United States* v *United States Gypsum Co*, 438 US 422, 445 (1978), a person who causes a particular result is said to act purposefully if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct[.]' while he is said to act knowingly if he is aware 'that the result is practically certain to follow from his conduct, whatever his desire may be as to that result.'

"• • •

"In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *United States* v *Bailey, supra*, at 403-405.

The trial judge read the statute under which the Petitioner was charged to the jury (Tr 1559), he defined the four elements of the crime, repeating them twice (Tr 1559-1561), he clarified the meaning of the first three elements (Tr 1561-1563), he repeated the four elements (Tr 1564) and then he turned to defining the knowledge element (Tr 1564-1565):

"What about the word 'knowing?' Remember that one of the elements concerns the matter of knowing. You must be convinced beyond a reasonable doubt that, when

the Defendant caused a claim to be made or presented, he or she—he or it had knowledge that it was false, fictitious or fraudulent. Knowledge is an important element of this crime and knowledge not only means actual knowledge, but also it means constructive knowledge gained through notice of facts and circumstances from which guilty knowledge may be inferred.

"One may not deliberately close his, her or its eyes to what otherwise would have been obvious to him, her or it; however, an act is not done knowingly if it is done by mistake, by carelessness, with an honest belief that the claim was true or for other innocent reasons.

"The statute, the law that I have earlier made reference to, defines the word 'knowing' as follows: Knowing and knowingly means that a person is aware of the nature of his conduct and that his conduct is substantially certain to cause the intended result."

The Michigan Court of Appeals affirmed the giving of that instruction, noting that it satisfies the requirement of the statute (Appendix 12a-14a). Another panel has made a similar type of analysis of MCL 400.607. *In re Wayne County Prosecutor*, 121 Mich App 798; 329 NW2d 510 (1982).

Although the Petitioner argues here and argued below that said ruling violates the Fourteenth Amendment, that argument is incorrect. The Fourteenth Amendment does not require a state to include the intent to deceive in a statute penalizing the presentation or making of a false Medicaid claim. *Cf. Patterson* v *New York*, 432 US 197 (1977).

Assuming, without conceding, that the Michigan courts have misconstrued their own statute, such decisions are not a denial of the due process guaranteed by the Fourteenth Amendment. *Neblett* v *Carpenter*, 305 US 297, 302 (1938).

Petitioner argues that MCL 400.607 is "quintessentially the same as 18 USC 1001." Assuming for the sake of argument that that is a correct argument, under 18 USC 1001 instructions similar to the one given in this case have been approved. *United States* v *Evans*, 559 F2d 244, 246 (CA5, 1977) *cert den* 434 US 1015 (1978); and *United States* v *Schaffer*, 600 F2d 1120, 1122 (CA5, 1979).

On the other hand, 18 USC 1001 contains the term "willfully", which is not in MCL 400.607. That difference supports a conclusion that specific intent is not part of the *mens rea* requirement of MCL 400.607. *See, United States* v *Cook*, 586 F2d 572, 574-575 (CA5, 1978).

MCL 400.607 is most nearly equivalent to 18 USC 287, and under 18 USC 287 instructions similar to the one in this case have been upheld. *United States* v *Hanlon*, 548 F2d 1096, 1101 (CA2, 1977); and *United States* v *Precision Medical Laboratories, Inc*, 593 F2d 434, 443-444 (CA2, 1978).

The foregoing authorities demonstrate that the Petitioner was not deprived of his right to due process of law by the jury instruction concerning knowledge.

II.

THE MICHIGAN COURTS CORRECTLY RULED THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT A JURY VERDICT.

Prior to the decision in *Jackson* v *Virginia*, 443 US 307 (1979), the Michigan standard for determining the sufficiency of evidence was disputed. In light of *Jackson*, the Michigan Supreme Court ruled:

"[T]he trial judge when ruling on a motion for a directed verdict of acquittal must consider the evidence presented by the prosecution up to the time the motion is made, • • • view that evidence in a light most favorable to the prosecution, • • • and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt, . . ." *People* v *Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979) (citations omitted).

In this case, the trial court denied all Defendants' motions for a directed verdict, citing both of the previously applied standards (Tr 1320-1321). The prosecution then directed the Court's attention to *Hampton* (Tr 1322). The judge considered that decision and under its standards reaffirmed his decision to deny a directed verdict (Tr 1323-1325). Thus, it is clear the trial court was applying the proper, legal standard in deciding the motions.

The four elements of the crime as charged under MCL 400.607; MSA 16.614(7) in the trial court are:

1. a claim must have been made or presented to an employee or officer of the State under the Social Welfare Act;

2. that claim must have been false, fictitious or fraudulent;

3. the Defendant must have made or presented the claim or the Defendant must have caused the claim to be made or presented; and

4. the Defendant must have acted knowing the claim was false, factitious or fraudulent.

Although this interpretation of MCL 400.607 was challenged in other arguments of the Petitioner's Brief in the Michigan Supreme Court, it was accepted for purposes of the present issue (Brief, pp 17-18). The Court of Appeals reformulated the elements of the crime as:

> ". . . 1) a person makes, presents, or causes to be made or presented, 2) to an employee or officer of the state, 3) a claim under the Social Welfare Act, 4) knowing the claim to be false, fictitious or fraudulent." (Appendix 9a)

What the Petitioner challenges is the correctness of the trial judge's decision that there was evidence from which a rational trier of fact could find that the claims presented were false, fictitious or fraudulent.

What Petitioner appears to ignore is a most important requirement set forth in *Jackson* v *Virginia, supra,* and *People* v *Hampton, supra.* The evidence must be viewed in the light most favorable to the prosecution in deciding whether a directed verdict is proper.

The claims in question, as indicated in the Statement of the Case, are found in Exhibit No. 36 (Count XVIII), Exhibit No. 34 (Count XX) and Exhibit No. 32 (Counts XXIII and XXV). Those claims describe the service performed as "laryngoscopy"; however, as the prosecution's experts indicated, that description is incomplete (Tr 573 and 693). But, that was not the only description used; the claims forms also have the procedure code "2140" typed in the appropriate space. Since code numbers are used in computer processing (Tr 680-683), the code number is of clearly more significance. Pages 1-4 of Chapter IV (the billing chapter) of the Practitioner Manual (Exhibit No. 1) indicates this, and Petitioner had notice of that fact by being sent that manual (Tr 679). In any

event, use of the code "2140" clearly modifies or describes the word laryngoscopy, which should not be taken out of its context on the claims forms.

There is no doubt that the code "2140" comes from page 98 of Exhibit No. 2 (enlarged as Exhibit No. 3), and that page defines Code 2140 as: "laryngoscopy, direct, diagnostic." Whether the adjectives "direct, diagnostic" are put before the noun (as the Information in this case does) or after the noun (as the manual does), those adjectives have the same purpose, to modify and describe the noun "laryngoscopy," which is the standard medical practice (Tr 573 and 693).

In other words the claims in question, viewed in the light favorable to the prosecution, represent that direct, diagnostic laryngoscopies were performed for the patients identified. The uncontradicted evidence shows that, at best, only an indirect laryngoscopy was performed (compare Tr 969-970, 1009, 1052 and 1060 with Tr 574-575 and 1052-1053), and with regard to Count XVIII, the patient testified that the type of laryngoscopy allegedly performed on her (Tr 992-993) was not performed (Tr 1079-1080). Thus, the evidence was sufficient to allow a rational finder of fact to conclude that there was a false, fictitious or fraudulent representation in the claims.

The notation "laryngoscopy" on the patient charts and claims forms and the medical examination conducted by using Exhibit No. 5A could be considered (as the jury apparently did) as nothing more than a deception to give an appearance of propriety to the claims. *See, United States* v *Hooker*, 541 F2d 300, 305 (CA5, 1976).

The Information alleges that the claims represent the performance of a direct, diagnostic laryngoscopy, but that that procedure was not performed. Under that allegation, the only evidence needed to show falsity is proof that a direct laryngos-

copy was not performed. Such proof could have been adduced in at least three ways: (1) it could be shown that the patient was not seen at all; (2) it could be shown that the patient's larynx was not examined, or (3) it could be shown that only an indirect laryngoscopy was performed. With regard to the convictions of the Petitioner, the proofs were of the second and third types on Count XVIII, while they were of the third type as to Counts XX, XXIII and XXV.

The prosecution's theory of falsity submitted by the judge to the jury upon written request (Tr 1569) was consistent with both the Information and the evidence.

The Petitioner also refers to 18 USC 1001 and cases decided thereunder as reasons to reverse the trial court's denial of a directed verdict, but some of those cases are completely distinguishable because they deal with aspects of perjury that are unique to that crime. The basic theme of those cases is that the criminal statutes in those cases do not punish innocent errors or differences of opinion.

There are three basic answers to this argument. First, in this case, the jury instructions recognized the defense of mistake when the trial court instructed the jury:

> ". . . an act is not done knowingly if it is done by mistake, by carelessness, with an honest belief that the claim was true or for other innocent reasons." (Tr 1565)

Whether the acts of the Petitioner were "knowing" or "mistake" was for the jury. Second, this case does not involve negative implications like the perjury cases cited by Petitioner do. It is based upon the description "laryngoscopy" followed by the use of the code "2140," which are affirmative representations. Third, the cases cited do not apply to this case because of the different statutory language. A false claims statute

should not be so strictly construed that it is effectively nullified. *United States* v *Bramblett*, 348 US 503, 510 (1955). The purpose of a motion for a directed verdict is to protect defendants from irrational juries. *People* v *Hampton, supra,* at 367. In this case, viewed favorably, the evidence was sufficient to allow a rational finder of fact to find beyond a reasonable doubt that the claims were false, fictitious or fraudulent. *See United States* v *Cook, supra.*

With regard to the knowledge element, the evidence shows the Petitioner is an M.D. licensed in Michigan (Exhibit No. 10), that doctors do not use the word laryngoscopy without modifying it to describe the manner of performance (direct or indirect) (Tr 573 and 693), that the Petitioner saw patients personally (Tr 1053), that the office practice was for the treating physician or physician's assistant to complete both the billing form and patient chart the same way (Tr 1067-1068), that only the word laryngoscopy was used on those forms (Exhibit Nos. 56, 58 and 60) and that as a medical practice indirect laryngoscopies are not usually separately identified and billed (Tr 580 and 628). Also, the amount billed was about half the total amount of the claims (Exhibit Nos. 36, 34 and 32).

Viewed favorably to the prosecution, this evidence supports a conclusion that the Petitioner had knowledge that he was causing false claims for direct laryngoscopies to be submitted. The *mens rea* requirement of a crime should not be construed in a way that makes the defendant conviction-proof. *People* v *Vinokurow*, 322 Mich 26, 30-31; 33 NW2d 647 (1948).

The Petitioner argues that he was deprived of his right to due process of law because the claims forms in question were literally true. As the foregoing references to the record demonstrate, those forms read as a whole and in the Medicaid billing context were not literally true. The jury correctly found that they were false claims.

CONCLUSION AND RELIEF SOUGHT

The Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari to the Michigan Court of Appeals.

Respectfully submitted,

FRANK J. KELLEY
Attorney General of Michigan

Louis J. Caruso
Solicitor General of Michigan
Attorney for Respondent

Edwin M. Bladen
Assistant in Charge
Economic Crime Division

J. Ronald Kaplansky
Donald E. Erickson
Assistant Attorneys General

760 Law Building
525 West Ottawa St.
Lansing, MI 48913
Telephone: (517) 373-1124

DATED: